IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 87.

ORSEL McGHEE and MINNIE S. McGHEE, his wife,
Petitioners,

v.

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, ET AL., *Respondents.*

No. 290.

JAMES M. HURD and MARY I. HURD, *Petitioners,*

v.

FREDERIC E. HODGE, ET AL., *Respondents.*

No. 291.

RAPHAEL G. URCIOLO, ET AL., *Petitioners,*

v.

FREDERIC E HODGE, ET AL., *Respondents.*

BRIEF FOR RESPONDENTS IN REPLY TO BRIEF FOR UNITED STATES AS AMICUS CURIAE.

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BRIEF FOR RESPONDENTS IN REPLY TO BRIEF FOR UNITED STATES AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The United States, through the Attorney General and the Solicitor General, has filed a brief supporting without deviation the contentions of the petitioners in these cases. It asserts that "The Federal Government has a special responsibility for the protection of the fundamental civil rights guaranteed to the people by the Constitution and laws of the United States," but not once in the 123 pages

of its brief does it recognize that the white respondents in these cases are included in that fundamental proposition. Basically, the United States is asserting that the Negro petitioners, and Negroes generally, have rights superior to and beyond white citizens. For this reason, as well as because of certain gross misrepresentations of decisions of this Court, the respondents deem it necessary to file this additional brief.

As indicated in the principal briefs of respondents in these cases, sociological and political arguments, presented at length by petitioners and now by the Government, have no place in the consideration or decision of the questions presented. Nevertheless respondents feel compelled to comment on the lengthy quotations represented to be from letters, copies of which are stated to have been filed in the Clerk's Office, addressed to the Department of Justice by the Administrator, Housing and Home Finance Agency, dated November 4, 1947 [1]; by the Surgeon General, dated October 13, 1947 [2]; by the Under-Secretary of the Interior, dated November 10, 1947 [3]; and by the Legal Adviser to the Secretary of State, dated November 4, 1947.[4] Undoubtedly these letters were solicited by the Department of Justice after it had determined to file a brief in these cases, and respondents call on the Department to file in the Clerk's Office true copies of the letters sent by it to these various agencies in solicitation of the responses quoted from.

However, these letters and the Government's assertions based thereon are not a part of the records herein, are not material, and should not be considered in the decision of these cases.

The Government joins with the petitioners in basing its argument on the unique and false propositions that (1) an individual has a right to purchase or lease a specific parcel

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[1] Page 5, Brief for the United States.

[2] Page 13, Brief for the United States.

[3] Page 15, Brief for the United States.

[4] Page 19, Brief for the United States.

of property owned by another; and (2) the enforcement of these private restrictive agreements is "government action" which is prohibited by the Fifth and Fourteenth Amendments of the Constitution. The cases cited and referred to by the Government to support the contention that rights "secured by the Constitution are invaded by the decrees in the courts below" are not in point and do not give support to such contentions.

The principal briefs of respondents in these cases establish (1) the fundamental right of all persons to contract with respect to their private property in the manner now being examined; (2) that restrictive agreements and covenants are not violative of any Constitutional provisions, but rather express the clear right of individuals to control their private property and to obtain the enforcement of those private contract rights by judicial decree.

The purpose here is to point out the inapplicability of the cases relied on and the false conclusions reached by the Government.

ARGUMENT.

Hirabayashi v. *United States*, 320 U. S. 81, *Korematsu* v. *United States*, 323 U. S. 214, and other like cases involved a curfew order issued by the Commander of a West Coast Military Area during the war between the United States and Japan, issued pursuant to an executive order of the President under his war powers. These cases did no more than hold that in time of war action taken for reasons of military security, while not excluded from the provisions of the Constitution, nevertheless was not an unconstitutional discrimination against the citizens of Japanese ancestry in violation of the Fifth Amendment, which contains no equal protection clause and restrains only such *discriminatory legislation* by Congress as amounts to a denial of due process; and this Court observed that "legislative classification or discrimination based on race alone has often been held to be a denial of equal protection".[5]

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[5] *Hirabayashi* v. *United States*, *supra*.

Also relied on are cases involving discrimination against Negro members of a craft under the collective bargaining provisions of the Railway Labor Act.[6] This Court examined whether or not the actions of the administrative agency and the union's exclusive right to represent a craft where Negroes were systematically excluded or otherwise denied proper representation, were contrary to the provisions of the Constitution. This Court held[7] that to deny membership and equal right of representation of Negroes in such unions constituted a denial of an *administrative remedy* under the Acts, leaving no mode of enforcement of the minority group's rights under the statutes except by resort to the courts.

The cases relating to selection of jurors and the right of trial of Negroes, stressed by the Government, are addressed to the question "whether, in composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury." *Strauder* v. *West Virginia*, 100 U. S. 303. And where discriminatory practices of state officials were involved this Court recognized the ministerial functions of the officials were not in any sense *judicial*.

Equally without application are the numerous cases cited by the Government involving statutes or ordinances which, because of their provisions or application by state officials resulted in unreasonable classifications or discriminations based on race, ancestry or color, were held to be prohibited by the Fourteenth Amendment of the Constitution.[8]

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[6] *Steele* v. *Louisville & Nashville, R. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive F. & E.*, 323 U. S. 210.

[7] *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192.

[8] *Truax* v. *Raich*, 239 U. S. 33; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Bush* v. *Kentucky*, 107 U. S. 110; *Pierre* v. *Louisiana*, 306 U. S. 354; *Hale* v. *Kentucky*, 303 U. S. 613; *Neal* v. *Delaware*, 103 U. S. 370; *Hollins* v. *Oklahoma*, 295 U. S. 394 (a *per curiam* opinion on the authority of *Neal* v. *Delaware, supra*; and *Norris* v. *Alabama*, 294 U. S. 587); *Nixon* v. *Herndon*, 273 U. S. 536; *Smith* v. *Allwright*, 321 U. S. 649; *Yu Cong Eug* v. *Trinidad*, 271 U. S. 500, involving a statute of the Philippine legislature.

Mitchell v. *United States*, 313 U. S. 80, and prior cases relating to interstate travel[9] refer to the Federal right to control interstate commerce, through an administrative agency, and hold simply that equal but separate accommodations do not result in unreasonable classifications or denial of equality of treatment.

The Government asserts and apparently casts its criticism of the judicial enforcement of these private contracts on the fact that they are an attempt to control problems of "race hostilities". Nothing in the records of the present cases indicates "hostilities". This is apparently a deliberate attempt on the part of the Government to read into these contracts motives which are not present, even if the motive for a private contract were proper for a court to examine. There is no doubt that legislative action by the Congress or a State must be based upon its power to control the subject matter of the statutes. In *Buchanan* v. *Warley*, 245 U. S. 60, the ordinance was based on a declared desire to minimize the conflicts between the races and to preserve what the State considered to be the public peace and welfare. Certainly there is no conflict between the statement of this Court that: "desirable as this is, and important as it is for preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution",[10] and the respondents' rights, whatever their motive, to enter into private contracts relating to their property.

The Government asserts that segregation of residential areas, based on race or color of the occupant, results in an unreasonable and arbitrary classification and is a "deprivation without due process of law". And it asserts that it therefore follows that these private contracts are uncon-

[9] *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Gaines* v. *Canada*, 305 U. S. 337.

[10] Page 81, Brief for the United States, quoting from *Buchanan* v. *Warley*, *supra*.

stitutional because *the municipal ordinance* in *Buchanan* v. *Warley, supra,* was, for these reasons, held to be contrary to the Constitution. There can be no logic in such fallacious reasoning.

The Government brief quotes from *Fay* v. *New York,* 332 U. S. 261.[11] This quotation is lifted out of context and deliberately misrepresents the meaning of the opinion. At pages 282-283 of the opinion this Court states:

> "While this case does not involve any question as to exclusion of Negroes or any other race, the defendants rely largely upon a series of decisions in which this Court has set aside state court convictions of Negroes because Negroes were purposefully and completely excluded from the jury. However, because of the long history of unhappy relations between the two races, *Congress has put these cases in a class by themselves.* The Fourteenth Amendment, in addition to due process and equal protection clauses, declares that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.' So empowered, the Congress on March 1, 1875, enacted that 'no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude'; and made it a crime for any officer to exclude any citizen on those grounds. (March 1, 1875) 18 Stat. 336, 337, c 114, 8 USCA § 44, 2 FCA title 8, § 44. For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color, which is wanting in every other case of alleged discrimination. This *statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress.* (Italics supplied) Referring to the provision empowering Congress to enforce the Fourteenth Amendment, it said that 'All of the amendments derive much of their force from this

[11] Page 69, Brief for the United States. The case involves the validity of so-called "blue-ribbon" juries in criminal cases.

> latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation.' (Italics in original) Ex parte Virginia, 100 US 339, 345, 25 L ed 676, 679."

Thus it is clear that this Court has reaffirmed Ex parte Virginia, 100 U. S. 339, in recognizing that the judicial power of the Federal Government is not authorized to "declare void any action of a State in violation of the prohibitions" of the Fourteenth Amendment.

Conceding for the moment that Congress may, pursuant to its right to *enforce* the prohibitions of the Fourteenth Amendment by legislation (Section Five), adopt legislation directed to striking down all private restrictive agreements and covenants, similar to its action relating to juries, the fact remains decisively clear *that it has not done so.* There has been no attempt by Congress to legislate the abolition of these private contracts, and in the absence of such legislative action the further observations of this Court in *Fay* v. *New York, supra,* are appropriate:

> "We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the State jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process."

Petitioners do not contend that the judicial procedure afforded in these cases in the courts below results in denial of equal protection or due process; they, and the Government, contend that the injunctive relief giving effect to the private contracts was "State action".

Section 1978 of the Revised Statutes [12] does no more than afford equal rights, *but no greater rights*, to the Negro who, at the time of the adoption of the Fourteenth Amendment and the enactment of this and companion statutes, had so recently been granted full citizenship. Congress did not then, nor has it since, undertaken to endow the Negro with *greater* rights. Civil Rights Cases, 109 U. S. 3; *Virginia* v. *Rives*, 100 U. S. 313.

The Government asserts [13] that this Court "is confronted by the existence of such a mass of covenants in different sections of the country as to warrant the assertion that private owners have, by contract, put into effect what amounts to legislation affecting large areas of land—legislation which, if enacted by Congress, by a state legislature, or by a municipal council, would be invalid." This statement, coming from the pen of public servants, is insidious and indefensible. The Government, presumably impartial in its executive functions, has here laid bare its mind; it denominates private contracts relating to private property as *legislation*, because, it says, there are so many of them. Hence, whenever contracts of sale, or leases, mortgages, etc., in use generally, contain uniform language, they are not private contracts or instruments, but legislation. Then it must follow, inversely, that Private Laws enacted by Congress are not statutes, but private contracts. Mere numbers cannot change the character of the instrument, or the rights secured to the parties.

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[12] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 8 U. S. C. 42.

[13] Page 79, Brief for the United States.

There is nothing in the records before this Court establishing that these restrictions are the result of a concerted move to exclude Negroes systematically from "large areas of land" or that the restrictions have made "this a Nation of racial patch quilts".[14] Nor does the record disclose any foundation for the statement [15] that such covenants "came into general use as a substitute for invalidated racial restriction legislation." As a matter of fact the restriction involved in Cases Nos. 290 and 291, arising in the District of Columbia, were placed on the property by the developers in *1906, eleven years before Buchanan* v. *Warley* (245 U. S. 60). The Government misconceives the real issue involved in these cases, as do the petitioners, and by broad, unfounded statements attempts to divert this Court from the only Constitutional point raised, i.e.: Are the courts prohibited, under the Constitution, from enforcing private contracts relating to private rights in private property?

This Court has recognized the wisdom of limiting its decisions to those matters actually presented by the facts and the issues raised. And the rule applies with equal force whether the matter involves the construction of a statute or relationships not the subject of statute.

> "It has no jurisdiction to pronounce any statute, either of the State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool, New York and Phila. Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39.

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[14] Page 79, Brief for the United States.

[15] Page 83, Brief for the United States.

Again the Government[16] lifts from the context language of this Court in *Block* v. *Hirsh* (256 U. S. 135) which involved the constitutionality of temporary emergency legislation by Congress regulating rents and tenancies in the District of Columbia during the period immediately following the First World War, and based on a specific legislative declaration of the emergency then existing. This Court specifically noted that the legislation was for a "limited period of time (2 years) and "to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." In 1924, this Court, speaking through Mr. Justice Holmes, in *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, declared that statute (The Ball Rent Act) was inoperative because the emergency, which gave rise to the statutory suspension of the private rights of property owners, no longer existed.

Not unlike The Ball Rent Act involved in *Block* v. *Hirsh, supra*, and *Chastleton Corp.* v. *Sinclair, supra*, is the Emergency Price Control law which was examined and held constitutional by this Court in *Bowles* v. *Willingham*, 321 U. S. 503, relating to the control of rents as well as prices during World War II.

At page 80 of the Government's brief an attempt is made to draw into point a series of cases relating to state moratorium laws enacted in many states during the depression years of the 1930s. There is no similarity in the propositions involved in those cases and in the cases now pending. The moratorium laws were held valid under the reserve power of the states to control by legislative determination the economic necessities of the people of the states. Mr. Justice Frankfurter in *East New York Savings Bank* v. *Hahn* (326 U. S. 230) refers to the key case of *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, and points out: "Merely to enumerate the elements that have to be considered (relating to the continued need for the New York State Moratorium Law) shows that the place

[16] Page 79, Brief for the United States.

for determining their weight and their significance is the legislature not the judiciary."

In furtherance of the Government's contention that the public interest must deny to the respondents access to the courts to enforce their private contracts, it relies on *Marsh v. Alabama* (326 U. S. 501) and *Martin v. Struthers* (319 U. S. 141). The Marsh Case involved the prosecution under a *state statute* of a person who sought to distribute religious literature in a town which was company-owned. As pointed out in the concurring opinion of Mr. Justice Frankfurter, "A company-owned town is a town. In its community aspects it does not differ from other towns." The majority opinion casts the decision in the following language:

> "The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the *liberty of press and religion* of these people consistently with the purposes of the Constitutional guarantees, and a *State statute*, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature, clearly violates the First and Fourteenth Amendments to the Constitution." (Italics supplied)

Similarly *Martin v. Struthers, supra,* held unconstitutional a city ordinance making it unlawful for any person distributing hand bills, circulars or advertising matter to ring doorbells, or otherwise summon the occupants of any residence. In that case this Court held that such an ordinance was violative of the Fifth and Fourteenth Amendments because it denied the right of freedom of speech and press. Not by any stretch of the imagination can the doctrines enunciated in these cases be considered in point or in any wise related to the question involved in the present cases. This Court in those cases recognized that:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside

reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Martin* v. *Struthers*, 319 U. S. 141, 146.

Not even the petitioners in the present cases urge here, nor did they urge below, that they have been denied freedom of speech, press or religion. The attempt to convert these private contracts relating to private property, not sanctioned or restrained by local legislation, into "matter of high public interest"[17] finds no support in any decision of this Court.

Equally without merit is the Government's contention that the test of the validity or enforceability of contracts is contingent on the parties' consideration of "the broader social and economic consequences of their action".[18] The right to contract is guaranteed by the Constitution, carrying with it the undoubted right to enforcement, and has never been dependent upon "social and economic consequences". If the Government's contention were valid, courts could examine into such broad and divergent matters as are incomprehensible before rendering judgment on the right to the enforcement of the ordinary every day contracts of individuals relating to their private property. If one enters into a lease with another for a given amount of rent, and it becomes necessary to sue for the collection of

[17] Government brief, page 82 citing *Nixon* v. *Condon*, 286 U. S. 73, 88, where it was held that the political parties of the state were "the repositories of official power" of the state under the statute. "They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere."

[18] Page 84, Brief for the United States.

that rent, the court, under the Government's theory, would necessarily have to determine whether the rent called for in the lease would bring about grave and possibly disastrous economic results on the community, or possibly whether or not the particular tenant was being cared for properly from a social standpoint. Such utterly ridiculous statements completely discredit the arguments of the Government.

Neither petitioners nor the Government show how and in what manner petitioners are deprived of their property without due process of law. The property was not theirs—the Negro petitioners acted with full knowledge of the existence of the restrictions and in utter disregard of them and the white petitioner,[19] though not compelled to acquire the property or to sell to the excluded class, took with full knowledge of the pre-existing rights of respondents. The Courts below defined the legal consequences of petitioners' acts and declared the applicable principles of real property law. Petitioners were not deprived of *their property*, for they had no property. Lack of jurisdiction of the Courts below is not claimed; lack of proper parties or failure of full hearing is not charged. Petitioners and the Government say only that the Courts below did not decide the cases the way they urged. Certainly this does not constitute a lack of due process.

Kryger v. *Wilson*, 242 U. S. 171.
Anderson Nat. Bank v. *Luckett*, 321 U. S. 233, 246.

CONCLUSION.

Neither the records in the present cases, nor the decisions of this Court or any State court, justify the pernicious statements in the Government's brief, particularly set out in their conclusions beginning at page 121. The Government presumably serves all citizens, yet it charges these respondents and others with ignorance, bigotry and prejudice. It is understandable that private litigants may make

[19] Cases Nos. 290, 291.

statements of this kind in their effort earnestly to press their cases, but the Government must not only be criticized, but condemned, for such practice.

Respondents submit that the Government, as well as petitioners, base their case on a false premise, not founded on the Constitution, statutes or judicial decisions. Due process of law and equal protection have been afforded petitioners; they are entitled to no more. And respondents likewise are entitled to, and here contend that the decrees below have afforded, due process and equal protection. Respondents do not claim to be superior to, or entitled to greater rights than petitioners. They do say that they would be denied these Constitutional guarantees if they were denied the right to contract in relation to their private property and to enforce such contracts in an orderly manner under well established substantive and procedural principles.

It is respectfully submitted that for the reasons set out herein and in the separate principal briefs of the respondents in these cases the decisions of the Courts below should be affirmed.

Respectfully submitted,

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